

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
HELEN WONG-ARMIJO	)	
	)	WT Docket No. 16-385
Applications for Waiver and	)	
Limited Extensions of Time	)	
To: The Commission		

**APPLICATION FOR REVIEW**

Helen Wong-Armijo (“Applicant”), the holder of various licenses in the Location and Monitoring Service, requests that the Commission review and reverse the Order (“Order”) of the Chief, Mobility Division, Wireless Telecommunications Bureau, dated November 20, 2017 (DA 17-1124), denying Applicant’s Waiver requests and requests for Limited Extension of Time to comply with the construction requirements of those licenses. The action taken pursuant to delegated authority is in conflict with Section 319(b) of the Communications Act of 1934, as amended [47 U.S.C. Sec. 319(b) (“Act”)], Section 1.946 of the Commission’s Rules [47 C.F.R. Sec. 1.946 (“Rules”)] , case precedent, and established Commission policy.

**Facts**

The facts are set forth in full in the Order. The Commission established M-LMS as a new service in 1995. In Auctions 21 and 39, licenses were auctioned that carried build-out date coverage requirements of one-third of the population in five years and two-thirds of the

population in ten years. Applicant won eighty-four licenses in Channel Blocks B and C in Auction 39, which were granted in October of 2001. Extensions of the build-out dates were granted in 2005, due to a lack of commercial equipment available to the licensees. In their various requests, all parties detailed their extensive efforts to locate and obtain equipment. In 2006, the Commission initiated a rulemaking that would make changes to the fundamental rules governing the M-LMS band (*M-LMS NPRM*, 21 FCC Rcd 2809). The Wireless Bureau acknowledged that the NPRM “engendered regulatory uncertainty for M-LMS licensees that may have contributed to a lack of M-LMS equipment development and service deployment.” (Order, *supra* at para. 9). No one could move ahead until the final rules were developed. Eight years later, on June 10, 2014, the Commission terminated that rulemaking without action (*2014 Termination Order*, 20 FCC Rcd 6361). All requests in the interim by all parties for extensions of the build-out dates cited as the reason for non-construction conditions beyond their control because no equipment was commercially available, and all extensions were granted by the Bureau, finding that a lack of commercially available equipment constituted a circumstance beyond the control of the licensees. But, on August 29, 2014, the Bureau, in extending the build-out dates for the licensees, stated that lack of available equipment would no longer be considered as a basis for further extensions. It did not, however, find that commercially available equipment was now available for purchase and, in fact, no equipment was available for purchase. On identical facts, it changed the legal conclusion.

### **Argument**

In December of 2017, no commercially available equipment is available to the licensees to construct an M-LMS system, and the Applicant has been unable to construct a system through

no fault of her own. The Communications Act, Section 319(b), specifically exempts parties from compliance with construction deadlines if the failure to construct was due to “*causes not under the control of the grantee*” [emphasis added (*Act*)]. The Commission Rule implementing the Act, Section 1.946(e)(1), states that extensions of construction deadlines may be granted if the extension is needed “due to involuntary loss of site *or other causes beyond its control*” [emphasis added].

The Wireless Bureau, in the Order, denied Applicant’s request to extend the buildout dates, but did not find that equipment is available for purchase. Rather, the Bureau held, as to the lack of equipment, “we expressly disclaimed that reason as basis for granting relief there or in the future....” (Order, at para. 27). They went on to state that even if equipment were not available they would grant no extensions for that reason [*affirmed on reconsideration* , cited in Order at para. 12]. This is the very definition of an improper, arbitrary decision, and a perfect illustration of the reason licensees are protected by the Act. It is through no fault of Applicant that equipment to provide service in the M-LMS band is not available. Put another way, how could it be ruled that the failure to construct facilities by a build-out date was the fault of the licensee when no manufacturer currently made any equipment that could be purchased in order to complete the build-out?

The determination that a lack of available equipment does not constitute a cause beyond the control of an Applicant is not a policy matter that can be determined willy-nilly. At least fifteen times for multiple applicants in this docket, the staff granted extensions of time to meet M-LMS build-out dates, finding that lack of commercially available equipment was not a circumstance within the control of the licensee. Similarly, in other proceedings, it was found that

other licensees in other services “demonstrated that they faced factors beyond their control, including difficulties in obtaining viable, affordable equipment” (*LMDS Extension Requests*, 23 FCC Rcd 5894, para. 24), and that therefore extensions were warranted.

The Bureau, in denying Applicant’s request, noted that one M-LMDS licensee, Progeny LMS, LLC, “has developed equipment capable of operating in this band....” (Order, para. 28.) Progeny may have developed equipment capable of operating in the band, but it did not develop equipment to operate in the band in accordance with the Rules for M-LMS because it required waivers of the Rules at various places in order to operate. Progeny, a private company with a highly proprietary system that probably has no economic viability, is a poor example for the Bureau to use. In partial, limited operation since 2012, Progeny’s system does not appear to have any commercial customers, its equipment is not available for purchase, and so far as is publicly known, its limited operation was in one city. Progeny’s concept appears to be that M-LMS is useful to track the location of individuals in tall buildings in an urban setting, a concept contrary to the purpose of the M-LMS Rule that the service be used primarily for vehicle location over a wide area.

The Bureau suggests at paragraph twenty-eight of the Order that, because Applicant did not develop her own equipment, the lack of availability of the equipment was a circumstance within its control. In no proceeding or service has the Commission included a requirement that implicit in a build-out date is a requirement that each licensee pay for the research and development of its own equipment. Every precedent, every decision of the Commission has

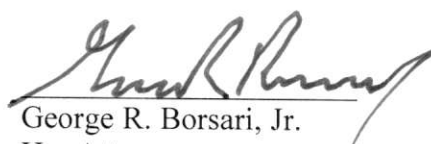
found that the lack of commercially available equipment is a circumstance beyond the control of the individual licensee.

For the reasons set forth above, the decision of the Wireless Bureau should be reversed and Applicant's requests for waiver and for extension of the build-out date(s) granted.

Respectfully submitted,

HELEN WONG-ARMIJO

By:

  
George R. Borsari, Jr.  
Her Attorney

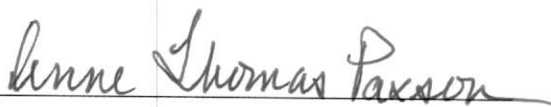
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December 20, 2017

**CERTIFICATE OF SERVICE**

I, Anne Thomas Paxson, a partner in the law firm Borsari & Paxson, hereby certify that a true copy of the foregoing "Application for Review" was this 20<sup>th</sup> day of December 2017 sent, via email, to the following:

Roger S. Noel  
Chief, Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

  
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The image shows a handwritten signature in cursive script that reads "Anne Thomas Paxson". The signature is written in dark ink and is positioned above a horizontal line.